83-1502

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

SELDON B. GRAHAM, JR.,

Petitioner,

v.

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, THE SECRETARY OF THE ARMY, AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SELDON B. GRAHAM, JR.
14303 Broadgreen
Houston, Texas 77079
(713) 497-3700

Petitioner

March 12, 1984

QUESTIONS PRESENTED

The questions presented are:

1. Whether Army generals will be allowed by federal courts to disobey higher civilian authority with impunity, and, also, to act in bad faith with impunity.
2. Whether judicial review is of facts as the court guesses them to be or of actual facts.
3. Whether Petitioner, an innocent victim, is to be denied a jury, denied a trial, denied a hearing, and denied an oral argument under the Constitution of the United States.

PARTIES TO THE PROCEEDINGS

Petitioner is Seldon B. Graham, Jr.

Respondents are Robert D. Bay, a reserve general; Russell I. Berry, a reserve general; Ladd F. Hunt, a reserve general; Major General James A. Johnson; Major General James C. Smith; Lieutenant General Harold F. Hardin; Clifford Alexander, Jr., former Secretary of the Army; and John O. Marsh, Secretary of the Army.

Respondents' attorney is Robert W. Rodrigues, Assistant United States Attorney, P.O. Box 61129, Houston, Texas 77208.

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In The

Supreme Court of The United States

October Term, 1983

Seldon B. Graham, Jr.,

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v.

Three or More Members of the Six Member Army Reserve General Officer Selection Board of 30 November 1979, the Secretary of the Army, and the United States of America Represented by the Secretary of the Army,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Seldon B. Graham, Jr. petitions for a writ of certiorari to review the December 16, 1983, decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is found in the Appendix. The decision of the United States District Court for the Southern District of Texas is found at 556 F.Supp. 669.

JURISDICTION

A petition for rehearing was denied by the Court of Appeals on January 11, 1984. Judgment of the Court of Appeals was issued as mandate on January 23, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The equal protection statutes ignored by the Court of Appeals are 10 U.S.C. § 277 and 10 U.S.C. § 1182(b). The discrimination among reservists regulation, not challenged by Petitioner, but merely illustrative of the fact that Petitioner had not been in the same class of reserve officers as Respondent reserve officers, is 32 C.F.R. § 102.2(b). This case is about an "individual" reservist who was eliminated by "selected" reservists. The waiver for truly outstanding officers, which Petitioner had been given but which was not in Petitioner's record, is required under Army Regulation 135-156, Par. 3-1c.

STATEMENT

This case is simple. It is a case in which the following are present:

(1) Malice

(2) Violation of Constitutional Rights

(3) Disputed Facts

(4) A cause of action against individual Respondents and also a cause of action against the United States

(5) A demand by Petitioner for Jury Trial

(6) No Jury

(7) No Trial Without Jury

(8) Judgment denying Petitioner's Right to Trial by Jury

(9) Judgment denying Petitioner's Right to Trial Without Jury

(10) Judgment denying Petitioner's Right to a judicial review on the true facts

(11) No undisputed facts or other evidence to support the Judgment

Petitioner's case is unrecognizable from the erroneous facts found in the opinion of the Court of Appeals, mercifully not published at 723 F.2d 905.

The Court of Appeals decision states that the court declines "to second-guess the Selection Board's reasons for selecting a candidate other that Graham for promotion". The Selection Board did not select a candidate other than Graham for promotion to Graham's position. The Selection Board's reasons for selecting a candidate other than Graham has never been an issue in this case. The "facts" provided by the Court of Appeals simply have nothing to do with this case.

The Court of Appeals decision states that "he (Petitioner) had missed drills". There are no drills. Mobilization designees such as Petitioner do not have drills. The "facts" provided by the Court of Appeals simply have nothing to do with this case.

The Court of Appeals is using its own imaginary facts to review Petitioner's case.

The Court of Appeals can only speculate as to the facts Petitioner has to prove a "probationary policy" under the rule in *Zimmerer* v. *Spencer*, 485 F.2d 176 (5th Cir. 1973). The Court of Appeals speculates that Petitioner has little

or no facts; yet, Petitioner has substantial facts. Thus, the Court of Appeals speculates Petitioner out of his property rights.

The Court of Appeals can only speculate as to the facts Petitioner has to prove "serious damage to his standing and associations in his community" under the rule in *Dennis* v. *S. & S. Consolidated Rural H. S. Dist.*, 557 F.2d 338 (5th Cir. 1978). The Court of Appeals speculates that Petitioner has little or no facts; yet, Petitioner has substantial facts. Thus, the Court of Appeals speculates Petitioner out of his liberty rights.

The Court of Appeals can only speculate as to the facts Petitioner has to prove malice preventing immunity of Respondents from personal liability. See *Wilkes* v. *Dinsman*, 48 U.S. 618 (1849) at 636. The Court of Appeals speculates that Petitioner has little or no facts; yet, Petitioner has substantial facts. Thus, the Court of Appeals speculates Petitioner out of his rights to discovery and to a trial.

This judicial review is not on Petitioner's case. It is on guesses. (And very poor guesses at that.)

The gravamen of this case is the Board's finding. Many disputed facts center around this finding.

A disputed fact with National Security implications is whether the generals on the Board obeyed legal written orders from higher civilian authority. This case can be called the

"REVOLT OF THE GENERALS" case.

Other disputed facts are whether the finding was specific, whether the finding was false, and whether the finding was supported by evidence. The seriousness of these disputed facts has not been grasped by the courts.

The 6 generals on the Selection Board were instructed by the Secretary of the Army in writing to make a finding of specific deficiency. A finding of a specific deficiency means a finding of a specific fact. See *Heidman* v. *United States*, 414 F.Supp. 47 (N.D. OH. 1976).

The selection board in *Heidman*, supra, made a finding that Colonel Heidman lacked a college degree. Now that is a specific fact.

Respondents' finding was vague, general and patently artificial. See *Burnaman* v. *Bay City Ind. Sch. Dist.*, 445 F.Supp. 927 (D.C.,S.D.Tex. 1978). The stated reasons were a pretext. See *Burnaman*, supra.

Petitioner was an infantry colonel in the Army Reserve and is a graduate of the Infantry Officer Candidate School, the United States Military Academy at West Point, the Army Command and General Staff College, the Industrial College of the Armed Forces, the Air War College, and the Army War College. Petitioner was on active duty for 5 years, most of which was in Europe and Korea. Every officer in Petitioner's chain of command, up to and including

the Chief of Staff, had nominated or recommended Petitioner to be a brigadier general. Petitioner received perfect scores on Officer Evaluation Reports (Army slang: "max OER's") in his own general officer position in the Pentagon and as Deputy Assistant Commanding General of the 101st Airborne (Air Assault) Division at Fort Campbell, Kentucky. Yet, the Board's finding was that Petitioner's *RECORD* did not reflect the professional qualifications and leadership required for promotion. Coming from Respondents, not all of whom could pass the *Heidman* test, the finding is not credible.

The reason the finding is an unsupported general conclusion is because the finding is the *COMPROMISE* of a *SPLIT* board. It should be remembered that a majority is required for a finding.

Here, it should be noted that the Court of Appeals ignored the significant fact that a subsequent selection board, convened after Petitioner's discharge, found the waiver missing from Petitioner's *RECORD* to be a specific deficiency in Petitioner's case.

To Petitioner, the only satisfying result of this experience has been the rush of generals volunteering their support to Petitioner, some of whom have also volunteered to appear as a witness on Petitioner's behalf. There comes a time to man the ramparts.

The question is whether generals can act in bad faith *with impunity* and also disobey legal written orders of higher civilian authority *with impunity.*

If the Supreme Court of the United States says yes, this Old Republic is in trouble. There is a Duty to our Country to try to prevent this from happening.

SUMMARY OF REASONS FOR GRANTING THE PETITION

According to fundamental concepts of American justice and fair play, it is the only thing to do.

REASONS FOR GRANTING THE PETITION

In time of war, America has always relied on citizen soldiers. They are a valuable resource in our national defense. Court decisions that impact on citizen soldiers also impact on our national defense posture. The decision in this case is such a vital national defense decision.

This is a case of first impression in many respects. It is unique. It is one of a kind. This fact situation will never again be available to this Court, if petition is not granted.

If petition is not granted, there is little doubt that this case will be cited in the future to support military disobedience. If petition is not granted, it will send a signal to generals that they can get by with most anything.

If petition is not granted, the Deputy Chief of Staff for Personnel will probably stop reminding selection boards to be sure to have a specific basis for their action. (This case appears to have done some temporary good at least.) There never has been much question about what the word "specific" means. See, *Heidman*, supra.

Error was done by the Court of Appeals. Proper development of law requires the questions posed be answered. The law itself will suffer if the questions remain undecided. There will be undue hardship and confusion if the questions remain unanswered.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SELDON B. GRAHAM, JR.
14303 Broadgreen
Houston, Texas 77079
(713) 497-3700

March 12, 1984

In The

Supreme Court of The United States

October Term, 1983

Seldon B. Graham, Jr.,

Petitioner,

v.

Three or More Members of the Six Member Army Reserve General Officer Selection Board of 30 November 1979, the Secretary of the Army, and the United States of America Represented by the Secretary of the Army,

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IN THE

United States Court of Appeals
For The Fifth Circuit

No. 83-2223
SUMMARY CALENDAR

SELDON B. GRAHAM, JR.,
Plaintiff-Appellant,

VERSUS

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF NOVEMBER 1979, *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(DECEMBER 16, 1983)

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

Appellant Seldon B. Graham, Jr., a colonel in the United States Army Reserve (USAR), was recommended for but did not receive a promotion to the rank of Reserve brigadier general. Upon expiration of thirty years and thirty days of service, Graham was therefore transferred to the Retired Reserve pursuant to his application under U.S.C. § 3851(a). He filed this action in January 1982 against several individual officers, the Secretary of the Army, and

the United States, claiming that the decision not to promote him infringed his rights to due process and equal protection. The district court held for defendants on cross-motions for summary judgment. We affirm.

I. Due Process Claims

Graham first claims that he had a protected property right to receive the promotion for which he had been recommended.[1] A property interest protected by the Due Process Clause must be more than a personal expectation of benefit; rather, it must stem from provisions of statute, regulation, or specific arangement "that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *see Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. (1972). Graham does not claim a protected entitlement to continued employment in the Reserves. 10 U.S.C. § 162(a); *Sims* v. *Fox*, 505 F.2d 857, 861 (5th Cir. 1974). Instead, he argues that his interest in promotion to Reserve brigadier general had sufficient foundation to qualify for due process protection. Had he been promoted, Graham would not have been forced to retire for another five years. 10 U.S.C. § 3851(a).

This case does not present circumstances sufficient to create a protected property interest. Neither Graham's previous record nor the existence of a highly competitive selection procedure is sufficient to instill in each presumably exemplary officer candidate a protected right to be promoted to Reserve brigadier general. Praise from senior officers and positive Officer Evaluation Reports, however important, *cf. Johnson* v. *Reed*, 609 F.2d 784, 787 (5th Cir.

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[1] Such a claim is among those reviewable by a federal court despite *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971). *See Sims* v. *Fox*, 505 F.2d 857 (5th Cir. 1974).

1980), created nothing more than a subjective expectation of promotion outside the scope of the Due Process Clause. Moreover, the period of probation that may follow denial of promotion does not transform the promotion process into a *de facto* tenure system. Probation is granted not in every case, but only on recommendation of the Army Reserve Officer Selection Board in those cases calling for a period of retraining. Ex. 3 at 47. *Cf. Zimmerer* v. *Spencer*, 485 F.2d 176 (5th Cir. 1973) (automatic one-year probation for nonrenewed teachers among factors leading to finding of "constructive tenure").

Plaintiff also failed to show the sort of injury to reputation necessary to trigger the protections of due process. Graham does not claim that the Army disseminated derogatory information about him. Instead, the sole injury to reputation asserted in this case is the allegedly stigmatizing effect of nonpromotion communicated by the simple fact that Graham was transferred to Retired Reserves. Although Graham denies that he lacks "the professional qualifications and leadership required for promotion to general officer," we cannot conclude that plaintiff's reputation was injured in a constitutionally significant way by the Army's decision not to promote him to higher rank. *See Paul* v. *Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1974); *Bishop* v. *Wood*, 426 U.S. 341, 347-50, 96 S.Ct. 2074, 2079-80 (1976); *Sims*, 505 F.2d at 862-64 (discharge case). Nor does Graham's inability to secure other employment as an "infantry colonel" create a protected liberty interest; the Army's salutary monopoly on military employment does not transform every discharge and failure to promote into a constitutional case. The Army did nothing to frustrate this retired colonel's ability to retain or secure employment. His liberty interest was therefore not infringed.

II. Equal Protection

Graham argues that the Selection Board discriminated against him because he lacked command experience (ordinarily a requirement for the promotion in question, but waived in this case) and because he had missed drills while exercising his right to travel. We agree with the district court that the defendants cannot be deemed to have admitted that all members of the Selection Board voted to recommend promotion. Following the teaching of *Mindes*, however, we decline to second-guess the Selection Board's reasons for selecting a candidate other than Graham for promotion. *See Woodward* v. *Marsh*, 658 F.2d 989, 992-95 (5th Cir. 1981).[2]

CONCLUSION

We have reviewed the record and find no merit to Graham's other claims, including that relating to the absence from his promotion file of the waiver of command experience. In light of our rejection of the constitutional claims we find no reason to consider the question of the individual defendants' immunity. The judgment of the district court is AFFIRMED.

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[2] Like the *Woodward* court, we note that Graham asserts no claim of race, religion or gender discrimination. 658 F.2d at 994 n.5. We also agree with the district court that Graham has demonstrated no standing to assert that his nonpromotion was rooted in his exercise of the right to travel. Order (March 31, 1983) at 5-6, R. 8-9.